"We do not think, however, that any of these decisions intended to hold that the so-called 'unbending test' of negligence could be invoked, even in a case between master and servant, to exempt a defendant from liability where he had used an appliance or method known not to be reasonably adequate when one of the latter character was available. If they can be properly so construed, we are prepared to ingraft a qualification."

On behalf of the "Unbending Test" it must be said that it is an easy short cut to the determination of negligence and will adequately apply in most ordinary cases. But when special circumstances or unusual dangers appear in the case, then the above test fails, for who can say that the use of certain appliances which are inadequate, though generally used, is enough to rebut negligence as a matter of law, when others are adequate and available. It is not the common usage that makes a machine safe, nor does safety always make for common usage, especially if it involves a little more trouble and expense, and its absence cannot cause loss due to its being generally used in that trade. Under such a ruling it seems it would be poor business for an employer to install a new and safer appliance, different from the ordinary appliance in that trade, for then if an employee should receive an injury, the master would be liable for negligence as a matter of law, since his machine was not in general usage.

The recent case of *Jeffress* v. *Virginia R. & Power Co., supra,* has undoubtedly gone far in crystallizing the attitude of the Virginia courts towards what constitutes negligence, by making reasonable care entirely a question of fact for the jury and commensurate with the degree of risk involved.

F. B. F., Jr.

Substituted Service of Process by Posting on the Front Door—Due Process of Law.—Judge Burks, in his work on Pleading and Practice, p. 300,[1] raises the question whether service of process by posting on the front door of defendant's residence when no one is found there constitutes "due process of law", and will sustain a personal judgment by default. It is the purpose of this note to indicate what seems to be the state of the law upon the subject, both in respect to authority and principle.

According to the common law, service had always to be personal.[2] That such substituted service as is reasonably designed to bring actual notice to the defendant may be authorized by statute is everywhere conceded.[3] Even those States having no such statutes uphold foreign judgments based upon substituted

[1] Mr. Morrissett's late revision of Burks, Pleading and Practice, p. 293.

[2] Baldwin *v.* Baldwin, 116 Ga. 471, 42 S. E. 727.

[3] Note, 50 L. R. A. 585.

service.[4] But so far as the statutes to which the writer has access truly indicate the situation, few States have gone the length of authorizing service by posting on the door.

In Virginia such service is authorized.[5] There is no *direct* decision on the subject, but the validity of such service has been tacitly admitted by the profession.[6] In South Carolina substituted service is provided for by the general stipulation that process may be left at defendant's most notorious place of residence.[7] Whether posting would suffice seems not to have been decided. Every presumption, however, is against its permission, since the scope of these statutes, derogatory of the common law, can never be enlarged by lenient construction.[8] Neither in Kentucky, nor in Maryland except under unusual circumstances, is any form of substituted service provided.[9] By the law of Indiana, where service is regularly made by leaving a copy of the summons at defendant's residence, the service is deemed *actual,* not constructive.[10] Under the Georgia Code[11] substituted service is provided for by the usual general provision that a copy be left at defendant's residence. It is likely, however, that the courts of that State would uphold service by posting, since a judgment by default was upheld where process was left with defendant's illiterate wife, though it did not appear that the nature of the business was explained to her.[12] Such a proceeding is not permitted even under the Virginia statute providing for service by posting.

In Mississippi, service by posting on the door has been expressly upheld, under a provision that service may be had by leaving a copy at some public place at the residence of the party.[13]

The rule of the United States equity courts requires, in default of personal service of *subpœna,* that a copy be delivered at defendant's dwelling house or usual place of abode, with some adult person who is a member or resident in the family.[14] But the common law courts of the United States, though never called upon to decide the constitutionality of service by posting, when permitted by a State statute, have, in a number of cases, impliedly recognized it. Two such cases arose under the Virginia statute.[15]

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[4] Note, 50 L. R. A. 585.
[5] Va. Code, 1919, §§ 6041, 6062.
[6] BURKS, PLEADING AND PRACTICE, p. 300; Morrissett's revision of same, p. 293.
[7] Code S. C., 1912, § 1476.
[8] Greenwood *v.* Murphy, 131 Ill. 604; Priestman *v.* Priestman, 103 Iowa 320, 72 S. W. 535; Settlemier *v.* Sullivan, 97 U. S. 444; Staunton, etc., Co. *v.* Haden, 92 Va. 201, 206, 23 S. E. 285.
[9] Ky. Code, 1915; Md. Code, 1911, Art. 75, § 172.
[10] Sturgis *v.* Fay, 16 Ind. 429.
[11] Ga. Code, 1911, §§ 4717, 5563.
[12] Lucas *v.* Wilson, 67 Ga. 356.
[13] Ramsey *v.* Barbaro, 12 Sm. & M. (Miss.) 113.
[14] Blythe *v.* Hinckley, 84 Fed. 228.
[15] See Earle *v.* McVeigh, 91 U. S. 503; King *v.* Davis, 137 Fed. 198, 206.

It appears, then, that the *tendency* of the courts, both State and federal, is to favor this form of service, though little else save *dictum* supports the statement.

But this tendency of the courts to the contrary notwithstanding, it would seem, upon principle, that one who suffers judgment by default, summons having been posted on his door when his home was unoccupied, and he having had no actual notice of the matter, may validly claim that he is being deprived of his property without "due process of law". Certainly "due process" means *notice* and a reasonable opportunity to be heard before a competent and impartial tribunal. And substituted service is upheld upon the theory that it is reasonably designed to give such notice and such opportunity to be heard. But in this day, when a man and his family are almost as likely to be abroad as at home, the method of posting is perhaps as reasonably designed, in many cases, to deprive a man of his day in court as to bring the suit to his actual notice.

The provisions for substituted service in this State are found in § 6062 of the Code of 1919, providing that summons may be served as a notice is served under § 6041, and in this latter section, which reads in part as follows:

> "A notice, no particular mode of serving which is prescribed, may be served by delivering a copy thereof in writing to the party in person; or, if he or she be not found at his or her usual place of abode, by delivering such copy and giving information of its purport to any person found there, who is a member of his or her family, (not a temporary sojourner, or guest) and above the age of sixteen years; or if neither he nor she, nor any such person be found there, by leaving such copy posted at the front door of said place of abode".

It is to be noted that the reasonable assumption that summons left with a *person* to be delivered to the defendant will actually come to his knowledge is fortified by requirements that the person be a member of his family, of an age of some discretion, and be informed of the purport of the document. But the unreasonable assumption that summons posted on the front door of an unoccupied residence will be the means of bringing actual notice to the defendant is fortified by no auxiliary provision whatever.[16] It requires no very vivid imagination to picture the removal of the summons by the plaintiff himself, by a mere meddler, or even by a gust of wind. And even though it be not removed, the defendant may come home to find notice of a suit in which judgment has already been rendered. The legislature should be unwilling to leave open this door to injustice, whether or no the courts can be induced to close it.

T. L. P.

[16] See 16 VA. LAW REG. 949, where Judge Duke advocates service by registered mail as auxiliary to posting, and advances convincing arguments in its favor.